

The ruling you have requested has been amended as a result of litigation and has been attached to this document.



December 5, 2001

Mr. Keith A. Martin
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

OR2001-5664

Dear Mr. Martin:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 155055.

The City of San Antonio (the "city") received a request for "any and all currently open audit/review/investigation projects (including municipal integrity)." You claim that the requested information is excepted from disclosure under sections 552.022 and 552.111 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted sample information.²

Initially, we address your claim that the requested information consisting of incomplete audit, review, and investigation projects is excepted under section 552.022(a)(1) of the Government Code because that section makes such *completed* documents expressly public. Section 552.022(a)(1) provides that a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is made expressly public except as provided by section 552.108 of the Government Code or if confidential under other law. However, section 552.022 does not serve as an exhaustive list of public information or as an exception to the release of information. Rather, it lists eighteen categories of public information that

¹The city has submitted no arguments in support of its claim that sections 552.103, 552.107, and 552.108 apply to except the requested information. Therefore, you have waived any claim of exception from disclosure under these sections of the Government Code. Gov't Code §§ 552.301, .302.

²We assume that the "sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

generally may be withheld only if confidential by law and, in the case of completed reports, investigations, evaluations, and audits, if excepted under section 552.108 of the Government Code. See Gov't Code § 552.022 (section 552.022(a) expressly states that it does not limit "the amount or kind of information that is public information under this chapter"). Thus, section 552.022 does not operate to except the requested information.

Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.--Austin 2001, no pet.). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; ORD 615 at 4-5.

You state that the information contains the advice, opinions, recommendations, and other materials reflecting the policymaking process of the city. After reviewing your arguments and the submitted documents, we conclude that some of them contain advice, opinions, and recommendations reflecting the policymaking process of the city. You may withhold this information, which we have marked, pursuant to section 552.111.

The submitted documents contain additional information that must be withheld. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," including information covered by the common law right of privacy. Common law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). This office has found that personal financial information not relating to the financial transaction between an individual and a governmental body is protected by common law privacy, see Open Records Decision Nos. 600 (1992), 545 (1990). The submitted documents include a small amount of personal financial information which must be withheld pursuant to the right of common law privacy. We have marked this information.

Furthermore, it appears that there is criminal history information within the submitted documents that the city has compiled. Under *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), where an individual's criminal history information has been compiled or summarized by a governmental entity, the information takes on a character that implicates the individual's right of privacy in a manner that the same individual records in an uncompiled state do not. Therefore, certain documents that we have marked must be withheld in their entirety under section 552.101 and the holding in *Reporters Committee*.

There is some requested information that is made confidential under the Medical Practice Act, (the "MPA"), chapter 159 of the Occupations Code. Section 159.002 of the MPA provides in pertinent part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient's behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

The MPA governs access to medical records. Open Records Decision No. 565 at 7 (1990). The MPA requires that any subsequent release of medical records be consistent with the purposes for which a governmental body obtained the records. Open Records Decision No. 598 (1991). Moreover, information that is subject to the MPA includes both medical records and information obtained from those medical records. *See* Occ. Code § 159.002(a), (b), (c); Open Records Decision No. 598 (1991). We have marked the medical information that you may release only in accordance with the MPA.

Further, section 1324a of title 8 of the United States Code provides that an Employment Eligibility Verification Form I-9 "may not be used for purposes other than for enforcement of this chapter" and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). The release of the submitted Form I-9 in response to this request for information would be "for purposes other than for enforcement" of the referenced federal statutes. A Form I 9 may be released only for purposes of compliance with the federal laws and regulations governing the employment verification system. Therefore, the city must withhold the marked Form I-9 under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code.

A W-4 form is confidential under section 6103 of title 26 of the United States Code. Section 6103(a) makes federal tax return information confidential. The term "return information" includes "the nature, source, or amount of income" of a taxpayer. *See* 26 U.S.C. § 6103(b)(2). Federal courts have construed the term "return information" expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer's liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp 748, 754 (M.D.N.C. 1989), *dismissed in part, aff'd in part, vacated in part, and remanded*, 993 F.2d 1111 (4th Cir. 1993). The city must withhold the marked W-4 form. In addition, the other federal tax return information that we have marked may be released only pursuant to section 6103(a) of the Internal Revenue Code and the federal regulations.

Additional information is excepted from disclosure under section 552.117 of the Government Code. Section 552.117 excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5* (1989). Therefore, the department may only withhold the social security numbers under section 552.117 on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. The department may not withhold this information under section 552.117 for those employees who did not make a timely election to keep the information confidential.

Moreover, section 552.117(2) excepts from public disclosure a peace officer's home address, home telephone number, social security number, and information indicating whether the peace officer has family members regardless of whether the peace officer made an election under section 552.024 of the Government Code.³ This information must be withheld.

In the event the employees whose information is at issue did not timely make the section 552.024 election referred to above, and for members of the general public, we note that a social security number may be excepted from required public disclosure under section 552.101 of the Government Code in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. *See Open Records Decision No. 622* (1994). Therefore, prior to releasing any social security number information, you should ensure that no such information was obtained or is maintained by the city pursuant to any provision of law enacted on or after October 1, 1990.

³ Section 552.117(2) applies to peace officers as defined by article 2.12 of the Code of Criminal Procedure.

Section 552.119 of the Government Code excepts from public disclosure a photograph of a peace officer that, if released, would endanger the life or physical safety of the officer, unless one of three exceptions applies. The three exceptions are: (1) the officer is under indictment or charged with an offense by information; (2) the officer is a party in a fire or police civil service hearing or a case in arbitration; or (3) the photograph is introduced as evidence in a judicial proceeding. This section also provides that a photograph exempt from disclosure under this section may be made public only if the peace officer gives written consent to the disclosure. Open Records Decision No. 502 (1988). The submitted information includes a photograph of an officer, and it does not appear that any of the exceptions are applicable. You have not informed us that the peace officer has executed any written consents to disclosure. Thus, the city must withhold the photograph depicting the officer. We have marked the photograph to be withheld.

In addition, section 552.130 excepts from public disclosure information relating to a driver's license or motor vehicle title or registration issued by an agency of this state. Thus, you must withhold driver's license, license plate, and vehicle identification numbers, as well as class of license and copies of licenses under section 552.130.

The submitted documents contain information that is protected by section 552.136. The Seventy-seventh Legislature recently added section 552.136 to the Public Information Act, which makes bank account numbers confidential. Senate Bill 694 was passed on May 14, 2001, and became effective when it was signed by the Governor on May 26, 2001. It provides, in relevant part, as follows:

Sec. 552.136. CONFIDENTIALITY OF CREDIT CARD, DEBIT CARD, CHARGE CARD, AND ACCESS DEVICE NUMBERS.

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Act of May 14, 2001, 77th Leg., R.S., S.B. 694, § 1 (to be codified at Gov't Code § 552.136). Thus, pursuant to section 552.136, we have marked the information that you must withhold.

Some of the submitted documents contain e-mail addresses obtained from the public that are excepted from public disclosure. The Seventy-seventh Legislature recently added section 552.137 to chapter 552 of the Government Code. This new exception makes certain e-mail addresses confidential.⁴ Senate Bill 694, as passed May 14, 2001, signed by the Governor May 26, 2001, and made effective immediately, provides in relevant part:

Sec. 552.137. CONFIDENTIALITY OF CERTAIN E-MAIL ADDRESSES.

(a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

Act of May 14, 2001, 77th Leg., R.S., S.B. 694, § 1 (to be codified at Gov't Code § 552.137). Section 552.137 requires the city to withhold an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body, unless the member of the public has affirmatively consented to its release. As there is no indication that the parties whose e-mail addresses appear in the submitted materials have consented to their release, the city must withhold them under section 552.137 of the Government Code. We have marked this information for your review.

The submitted information also includes fingerprint information that is subject to sections 559.001, 559.002, and 559.003 of the Government Code. These new statutes were enacted by the Seventy-seventh Legislature and took effect September 1, 2001. *See* Act of May 24, 2001, 77th Leg., R.S., H.B. 678, § 2 (to be codified as Gov't Code §§ 559.001, .002, and .003). They provide as follows:

Sec. 559.001. DEFINITIONS. In this chapter:

⁴House Bill 2589, which also makes certain e-mail addresses confidential, took effect on September 1, 2001. *See* Act of May 22, 2001, 77th Leg., R.S., H.B. 2589, § 5 (to be codified at Gov't Code § 552.136). The language of section 552.136, as added by House Bill 2589, is identical to that of section 552.137.

(1) "Biometric identifier" means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry.

(2) "Governmental body" has the meaning assigned by Section 552.003 [of the Government Code], except that the term includes each entity within or created by the judicial branch of state government.

Sec. 559.002. DISCLOSURE OF BIOMETRIC IDENTIFIER. A governmental body that possesses a biometric identifier of an individual:

(1) may not sell, lease, or otherwise disclose the biometric identifier to another person unless:

(A) the individual consents to the disclosure;

(B) the disclosure is required or permitted by a federal statute or by a state statute other than Chapter 552 [of the Government Code]; or

(C) the disclosure is made by or to a law enforcement agency for a law enforcement purpose; and

(2) shall store, transmit, and protect from disclosure the biometric identifier using reasonable care and in a manner that is the same as or more protective than the manner in which the governmental body stores, transmits, and protects its other confidential information.

Sec. 559.003. APPLICATION OF CHAPTER 552. A biometric identifier in the possession of a governmental body is exempt from disclosure under Chapter 552.

It does not appear to this office that section 559.002 permits the disclosure of the submitted fingerprint information to the requestor. Therefore, the city must withhold this information, which we have marked, under section 559.003 of the Government Code.

Finally, the submitted documents contain what appear to be incident reports, although it is unclear whether these reports pertain to actual incidents or were generated solely for the purpose of training officers. If the reports reflect actual incidents, the city must withhold some information under section 552.130 and possibly the social security numbers that are contained within them, as set forth above. In addition, one of the reports would be confidential in its entirety under section 58.007 of the Family Code. Juvenile law

enforcement records relating to conduct that occurred on or after September 1, 1997 are confidential under section 58.007. The relevant language of section 58.007(c) reads as follows:

(c) Except as provided by Subsection (d), law enforcement records and files concerning a child and information stored, by electronic means or otherwise, concerning the child from which a record or file could be generated may not be disclosed to the public and shall be:

- (1) if maintained on paper or microfilm, kept separate from adult files and records;
- (2) if maintained electronically in the same computer system as records or files relating to adults, be accessible under controls that are separate and distinct from controls to access electronic data concerning adults; and
- (3) maintained on a local basis only and not sent to a central state or federal depository, except as provided by Subchapter B.

It does not appear that any of the exceptions in section 58.007 apply, so the report would have to be withheld.⁵ If, on the other hand, these documents were created in order to train officers such that all confidential information contained within them is fabricated, they must be released in their entirety.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

⁵ There is some additional information, which we have marked, that is confidential under section 58.007 of the Family Code.

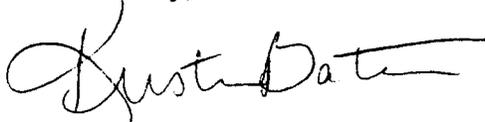
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Kristen Bates
Assistant Attorney General
Open Records Division

KAB/sdk

Ref: ID# 155055

Enc: Marked documents

c: Mr. Brian Collister
KMOL-TV
1031 Navarro Street
San Antonio, Texas 78205
(w/o enclosures)

CAUSE NO. GV104163

CITY OF SAN ANTONIO,
Plaintiff,

V.

GREG ABBOTT, ATTORNEY GENERAL
OF TEXAS,
Defendant.

§ IN THE DISTRICT COURT OF
§
§
§ TRAVIS COUNTY, TEXAS
§
§
§
§ 250TH JUDICIAL DISTRICT

AGREED FINAL JUDGMENT

On this date, the Court heard the parties' motion for entry of an agreed final judgment. Plaintiff City of San Antonio and Defendant Greg Abbott, Attorney General of Texas, appeared, by and through their respective attorneys, and announced to the Court that all matters of fact and things in controversy between them had been fully and finally compromised and settled. This cause is an action under the Public Information Act (PIA), Tex. Gov't Code ch. 552. The parties represent to the Court that, in compliance with Tex. Gov't Code § 552.325(c), the requestor, Brian Collister, was sent reasonable notice of this setting and of the parties' agreement that the City must withhold some of the information at issue; that the requestor was also informed of his right to intervene in the suit to contest the withholding of this information; and that the requestor has not informed the parties of his intention to intervene. Neither has the requestor filed a motion to intervene or appeared today. After considering the agreement of the parties and the law, the Court is of the opinion that entry of an agreed final judgment is appropriate, disposing of all claims between these parties.

IT IS THEREFORE ADJUDGED, ORDERED AND DECLARED that:

1. Working papers of financial audits of the City's Office of Internal Review that were open at the time of the request for information are exempted from disclosure under Tex. Gov't Code § 552.116, and the City may withhold this information from the requestor;

Martha Rodriguez Hernandez

DISTRICT CLERK
TRAVIS COUNTY, TEXAS

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2. Investigative files of the City's Municipal Integrity Office for investigations that were open at the time of the request for information are not excepted from disclosure, and the City must ^{make} ~~provide~~ ^{available} this information to the requestor, except as provided in paragraph 3 of this Judgment, no later than five business days after the City's receipt of a copy of the signed judgment;

3. The City must redact the social security numbers, home telephone numbers and addresses of city employees from the documents to be provided to the requestor, as provided in Tex. Gov't Code § 552.117; other persons' social security numbers should be withheld under Tex. Gov't Code § 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I) only if the City obtained and maintains them pursuant to a provision of law enacted on or after October 1, 1990;

4. The City shall provide the requestor with an unredacted version of the completed reports that were sent to him on March 16, 2004;

5. All costs of court are taxed against the parties incurring the same;

6. All relief not expressly granted ^{herein} is denied; and

7. This Agreed Final Judgment finally disposes of all claims between Plaintiff and Defendant and is a final judgment.

SIGNED this the 15th day of December, 2004.


PRESIDING JUDGE

APPROVED: ~~As To Form Only:~~


ELSA NAVA ^{with changes only}
Assistant City Attorney
Office of the City Attorney
Litigation Division
P.O. Box 839966
San Antonio, Texas 78283-3966
Telephone: (210) 207-8940
Fax: (210) 207-4004
State Bar No. 14826900
ATTORNEY FOR PLAINTIFF


BRENDA LOUDENSHINE
Assistant Attorney General
Administrative Law Division
P. O. Box 12548, Capitol Station
Austin, Texas 78711-2548
Telephone: 475-4300
Fax: 320-0167
State Bar No. 12585600
ATTORNEY FOR DEFENDANT